NO. 56476-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ALSTOM POWER, INC. and GE STEAM POWER, INC.,

Appellants/Cross-Respondents,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondents/Cross-Appellant.

REPLY BRIEF OF RESPONDENT/CROSS APPELLANT

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I. INTRODUCTION

There is a difference between taxing engineering and labor and accounting for the engineering and labor costs that went into creating a product to determine the value of that product. Alstom Power Inc. and GE Steam Power, Inc. (Alstom USA) want to eviscerate this distinction, arguing that the Department of Revenue had levied use tax on the engineering and labor, provided by Canadian and French affiliates (respectively, Alstom Canada and Alstom France), that went into creating the parts that Alstom USA used to rehabilitate turbines on the Chief Joseph Dam. What the Department actually did was levy use tax on Alstom USA's use of the turbines' replacement parts and measure the value of those parts by accounting for the engineering (design, modeling, and testing) and labor costs performed by a separate entity.

The Board of Tax Appeals (Board) correctly held that the "labor and engineering costs are part of the purchase price of the parts" and, therefore, the Department correctly accounted

for those costs to determine the parts' value. AR 32. The Board, however, erred by holding that "testing and engineering for the models that happened *prior* to the USACE's [Army Corps] authorization to go forward with the rehabilitation of the turbine generators, because it was a separate part of the contract, is not properly part of the purchase price of the turbine generators and thus is not subject to use tax." *Id*. Such a bifurcation is contrary to the contract's terms, which provided for several approval notices, and also contrary to the documents in the record.

Furthermore, the engineering and labor provided by Alstom Canada and France before and after approval both enhanced the turbines' replacement parts. The Department correctly accounted for both to determine the parts' value.

II. ARGUMENT

A. Alstom USA Owed Use Tax on the Turbines' Replacement Parts, Measured by the Value of the Parts

Alstom USA and the Department agree that Alstom USA is a federal contractor, and that federal contractors are

consumers subject to use tax under RCW 82.04.190(6) on all "tangible personal property incorporated into, installed in, or attached to" in the course of "constructing, repairing, decorating, or improving new or existing buildings or other structures . . . of or for the United States." Reply Br. Appellant at 1. Both parties also agree that Alstom USA had replaced or installed new turbine parts onto the Chief Joseph Dam, subjecting Alstom USA to use tax levied on the value of the parts. Br. Appellant at 5-6 ("[n]ew runners and wicket gates were installed on the turbines … existing runners and wicket gates were removed and replaced).[1]

[1] Alstom USA claims that the Board had "erroneously conclude[d] that the 'materials' subject to use tax were new turbine generators," citing to Conclusions of Law 7 and 10. Reply Br. Appellant at 6. However, the Board clearly recognized that the issue in this case is over use tax on "parts incorporated into the turbine generators," not the generators themselves. AR 29-32 ("[t]hey [Alstom USA and the Department] disagree about the measure of the tax due on the parts incorporated into the turbine generators").

Alstom USA, however, argues that under the Department rules on taxing government contractors, former WAC 458-20-17001 (Rule 17001), tangible personal property means only "materials," as in "the substances, constituents, elements, or parts – the 'raw materials' – that were installed into the rehabilitated turbines." Reply Br. Appellant at 9-11. Their claim is based on former Rule 17001(5) requiring government contractors to pay retail sales tax on "materials, including prefabricated and precast items, equipment and other tangible personal property," which they argue means that the rule has defined tangible personal property as "materials." Reply Br. Appellant at 10-11 ("[t]he statute imposes the tax on 'tangible personal property' and Rule 17001 interprets this term to mean 'materials'"). Alstom USA further defines materials as simply raw materials (such as plastic, steel and lumber). *Id*.

But courts have never restricted tangible personal property to mere raw materials. Tangible personal property is essentially goods and chattels, items that can include raw

materials (such as steel and lumber) but can also include things made from raw materials. This Court has decided cases regarding such tangible personal property as cell phones and airplane interiors. *See Sprint Spectrum, LP v. Dep't of Revenue*, 174 Wn. App. 645, 658, 302 P.3d 1280 (2013); *Walter Dorwin Teague Assocs., Inc. v. Dep't of Revenue*, 20 Wn. App. 2d 519, 523, 500 P.3d 190 (2021), *review denied,* 199 Wn. 2d 1013, 508 P.3d 680 (2022). The retail tax statute also defines "machinery and equipment" to include "tangible personal property that becomes an ingredient or component thereof, including repair parts and replacement parts." RCW 82.08.02565(2)(a).[2]

Alstom USA's definition of materials as merely "raw materials" is also overly narrow, and contrary to former Rule 17001(5). Raw materials cannot include prefabricated and precast items or equipment. Prefabricated means something

[2] The use tax is the companion tax to the retail sales tax. *Sprint Spectrum,* 174 Wn. App. at 658.

"built from parts that have been made in a factory and can be put together quickly." *Cambridge Online Dictionary*, https://dictionary.cambridge.org/us/dictionary/english/prefabricated (last visited August 22, 2022) (giving examples such as prefabricated buildings or bridges). Precast means something "formed into a particular shape and allowed to become solid before being used." *Cambridge Online Dictionary*, https://dictionary.cambridge.org/us/dictionary/english/precase (last visited August 22, 2022) (giving examples such as a diorama and a model). There is certainly no definition of equipment that is reduced to mere raw materials, with such common usages as "*office/camping/kitchen equipment*." *See Cambridge Online Dictionary*, https://dictionary.cambridge.org/us/dictionary/english/equipment (last visited August 22, 2022) (defining equipment as "the set of necessary tools, clothing, etc. for a particular purpose"). Prefabricated and precast items and equipment are, therefore, things made from raw materials such as plastic, lumber, and

steel. It is nonsensical to define things made from plastic, lumber, or steel as only plastic, lumber, or steel. "Materials," under former Rule 17001(5), necessarily has a broader meaning than just "raw materials."

In turn, tangible personal property cannot mean just raw materials. Tangible personal property can include items such as the turbines' replacement parts. The issue is how to determine the value of those parts under RCW 82.12.010(7)(b). The Department determined that the value of the parts includes the costs to engineer (including design, modeling, and testing) and labor to manufacture the parts, because these services enhanced the value of the parts; indeed, made the parts possible. The Board correctly upheld this valuation method.

B. The Department Correctly Measured the Value of the Turbines by Accounting for the Costs of the Engineering and Labor to Manufacture the Parts

Under RCW 82.12.020, Washington levies use tax in an amount equal to the "value of the article used" multiplied by the applicable rates in effect for the retail sales tax. RCW

82.12.010(7)(b) further defines "value of the article used" for federal contractors, such as Alstom USA, as the retail selling price of such articles or similar ones or, in the absence of such measures, a cost basis may be used.[3]

Applying the statutes here, Alstom USA paid a purchase price to Alstom Canada and France for the turbines' replacement parts that included the costs of the materials, the engineering (design, modeling, and testing), and the labor to manufacture the parts. AR 244 -255. Alstom Canada and France did not invoice Alstom USA for only the materials, but also invoiced for the engineering and labor. *Id*. Therefore, Alstom USA had paid a "purchase price" for the replacement parts that it installed on the Chief Joseph Dam that included engineering and labor costs.

[3] The Board decision cited and discussed RCW 82.12.010(7)(a), but the provision specific to federal contractors is (7)(b).

Furthermore, the engineering and labor provided by Alstom Canada and France enhanced the turbines' performance, and are thus intrinsic in the purchase price of the turbines' replacement parts. Alstom Canada and France designed and engineered the rehabilitation of the turbine units. Alstom France then modeled and tested the designs to see if they met the Army Corps' approval. Alstom Canada then manufactured the turbines' replacement parts according to its engineering and designs. Overall, this engineering and labor provided replacement parts that Alstom USA used to modernize the decades old turbines units, which increased the units' ever decreasing energy production. AR 242 (discussing improvement in "their [the turbines'] performance from 80 percent, for example, to 95, 96, 93 percent"). Without the materials, the engineering (design, modeling, and testing), and the labor to manufacture the parts, Alstom USA would not even have had viable replacement parts to rehabilitate the turbines, let alone components that improved the turbines'

performance. The Department cannot, therefore, fail to account for the engineering and labor costs when measuring the value of the turbines' replacement parts.

Alstom USA mischaracterizes the Department's position as "a tax on the design, engineering, or other services incurred on the federal project." Reply Br. Appellant at 10. It is not; it is applying the cost method to determine the value of the turbines' replacement parts. The Department accounted for the costs of the engineering and labor provided by Alstom Canada and France because their work enhanced the value of the parts.

The transactions between Alstom USA and Alstom Canada and France here are analogous to mechanics who purchase parts from manufacturers to repair cars. The parts manufacturers, in determining the price for those parts, factor in more than just the materials (the raw metal, plastic, rubber, etc.) used to make those parts, and, by necessity, factor in the costs of designing and manufacturing the parts. Thus, mechanics pay for more than just the plastics, metal, and rubber that make up

the car parts, but also for the engineering that went into designing and testing the parts as well as the labor to manufacture the parts.

The only difference here is that, normally, a company would recoup the engineering or design costs for a product over time. For example, the auto parts maker would not attempt to recoup the development cost for a new car part by charging the part's first buyer a price that covers the part's entire engineering and design cost. The company would spread such costs to many customers over time.

Because there was only one customer for the turbines' replacement parts, the Army Corps, Alstom USA could only recoup the engineering and labor costs to manufacture the parts from that one customer. They also chose to separate out the engineering and labor costs instead of incorporating those costs into one selling price for the parts. The principle, however, is still the same. Like the auto parts maker, the engineering and design provided by Alstom Canada and France increased the

value of the parts; indeed, without such engineering and labor, Alstom USA would not even have these parts. Also, like the auto parts maker, Alstom USA charged the customer, the Army Corps, for the engineering and labor that went into the turbines' replacement parts; only Alstom USA had separately invoiced for such services instead of incorporating the costs into one selling price.

Alstom USA compares the Department accounting for the engineering and design costs in the value of the turbines' replacement parts to taxing "architectural, engineering, interior design, landscape design." Reply Br. Appellant at 4. The company argues that the Department's valuation method "would allow the cost of these services to get swept into the 'value' of the materials and tangible personal property installed into the building or structure." *Id*.

When research and design services increase the value of an article used, it is necessary to account for the cost of such services to determine the true value of that article. This is

especially true when the article was made possible by such research and design services. Contrary to Alstom USA's characterization of the rehabilitation as merely replacing and fixing parts on the turbine units, Alstom USA needed the engineering and labor provided by Alstom Canada and France to have the parts necessary to rehabilitate the turbines. Alstom Canada and France then charged Alstom USA for these services. When certain services increased the value of an article, and, in this case, were necessary to produce the article, then the services are part of the selling or purchase price of the article, even when the seller separately invoiced for these services and for materials. Accounting in the costs of such services is vital to determine the true value of the article to the consumer (here, Alstom USA).

Otherwise, there is no distinguishing between the value of a badly engineered or poorly made part (with little spent on engineering and labor) with a well-engineered and superbly made part. Under Alstom USA's argument, if made with the

same kind of raw materials, a $10,000 car would have the same value as a $100,000 car with the latest engineering and technology. Under this scenario, the consumer for any product should request the manufacturer to separately charge for the engineering (including design and testing), labor to manufacture, and the materials that went into making the product. The consumer's use tax burden is then significantly lowered because, under Alstom USA's argument, use tax is only measured by the cost for materials. Such discounting of engineering and labor to manufacture, and accounting for only raw materials, would lead to many absurd valuations.

The Board, therefore, correctly upheld the Department's accounting for engineer and labor costs to determine the value of the turbines' replacement parts.

C. *Metalfab* is Irrelevant Because it Does Not Address the Issue In this Case of How to Determine the Value of the Article Used

Alstom USA cites *Metalfab v. Dep't of Revenue*, Docket No. 93-33, 1995 WL 730633 (Oct. 18, 1995), to argue that the

Board ignored its own precedent. Reply Br. Appellant at 17-18, 22-23. The Board did not ignore this case, but addressed it and found it irrelevant to the question of how to determine the value of the turbines' replacement parts. AR 0029-30 ("[t]here was no discussion about the measure of the tax due."). The Board is correct.

The taxpayer in *Metalfab*, as part of its work on the Little Goose Dam for the Army Corps, "purchased standard steel forms and reshaped them into fingerlings at its shop in the Tri-Cities." *Metalfab*, BTA Docket No. 93-33 at 2-3. The Board stated that the issue was: "[w]hen a subcontractor purchases materials which become part of a facility installed by the subcontractor on property owned by the United States, is the subcontractor liable for retail sales tax? If retail sales tax is not paid, is use tax due?" *Id*. at 1. The Board ultimately concluded that the taxpayer in *Metalfab*, as a federal government contractor, was liable for "use tax on the use of materials and supplies." *Id.* at 6. *Metalfab* is, thus, irrelevant to this case,

because it did not address how to measure "the value of the article used." RCW 82.12.010(7)(b).

More important, even if relevant, the Department's method here for calculating Alstom USA's use tax liability is consistent with *Metalfab*. In *Metalfab*, the taxpayer only purchased materials and supplies. *Metalfab*, BTA Docket No. 93-33 at 2-33. It did the work of rendering those materials into fingerlings in Washington. *Id*. Similar to the Department not levying tax on Alstom USA's work disassembling and reassembling parts off and onto the turbine units in Washington, the Department did not levy use tax on Metalfab's work in the State. The Department, in *Metalfab*, levied use tax on the only articles of tangible personal property used, the materials and supplies, and measured the value of those articles by their purchase price or, put differently, what the taxpayer paid for those materials and supplies.

Here, the Department measured the value of the turbines' replacement parts by their purchase price, which included the

costs of the engineering and labor to manufacture the parts; services that enhanced the value of the parts. The Board upholding the Department's valuation method in this case is, therefore, consistent with *Metalfab*.

D. Alstom USA's Judicial Estoppel Claim is Procedurally Invalid and Has No Merit

Similar to their argument on *Metalfab*, Alstom USA argues that the Department made a statement, in a brief filed in *Washington v. United States*, 460 U.S. 536, 103 S. Ct. 1344, 75 L. Ed. 2d 264 (1983), that is inconsistent with the Department's current position. Alstom USA is using this brief for an untimely judicial estoppel claim and to repeat the false assertion that the Department had taxed the labor and services provided by a federal government contractor.

Nearly four months after the Board held a hearing on cross motions for summary judgment, Alstom USA filed a three-page statement of additional authority. In this statement, Alstom USA directed the Board to an excerpt of a brief the Department filed in *Washington,* and to *Chonah v. Coastal*

Vills. Pollock, LLC, 5 Wn. App. 2d 139, 425 P.3d 895 (2018), a case that addressed judicial estoppel. The Department objected on the grounds that the Administrative Procedure Act (APA) does not authorize statements of additional authority and that a brief is not "authority." [4] The Board rejected both Alstom USA's statement and the Department's objection without comment, and did not include them in the administrative record. Now Alstom USA wants this Court to hold that the Board erred by not applying judicial estoppel. Reply Br. Appellant at 24-25.

"Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Anfinson v. FedEx Ground Package Sys., Inc.*, 174

[4] Alstom USA argues that the Department's brief in *Washington* is public record and asks this Court to take judicial notice of the brief. Reply Br. Appellant at 23. This is the first time Alstom USA has claimed that the brief is public record, and the first time they ask for judicial notice of the brief. Alstom USA had originally claimed that the brief was authority, which it is not.

Wn.2d 851, 861, 281 P.3d 289 (2012) (quoting *Bartley–Williams v. Kendall,* 134 Wn. App. 95, 98, 138 P.3d 1103 (2006)). This Court reviews the Board's decision on estoppel for abuse of discretion "guided by three core factors: (1) whether the party's later position is 'clearly inconsistent with its earlier position,' (2) whether acceptance of the later inconsistent position 'would create the perception that either the first or the second court was misled,' and (3) whether the assertion of the inconsistent position would create an unfair advantage for the asserting party or an unfair detriment to the opposing party." *Anfinson,* 174 Wn.2d at 860. While the federal appellate courts have upheld a trial court's *sua sponte* application of judicial estoppel, this does not mean that a trial court has abused its discretion by not applying estoppel when the parties failed to raise the claim or did so post-hearing. *See Davis v. Dist. of Columbia*, 925 F.3d 1240, 1256 (D.C. Cir. 2019).

Here, Alstom USA is claiming that the Board abused its discretion by not applying judicial estoppel, a claim that Alstom USA did not raise before the Board. They only implied a judicial estoppel claim in a statement of additional authority filed three months after the summary judgment hearing. Even now, Alstom USA has not assigned any error on judicial estoppel. Br. Appellant at 9-12 (Alstom USA's assignment of errors). This Court should reject Alstom USA's implied claim that the Board had abused its discretion by not applying judicial estoppel.

Regardless, judicial estoppel does not apply in this case because the Department's current position is consistent with the prior position in *Washington,* Alstom USA provides the brief excerpt to argue that the Department had represented that a state cannot impose use or sales tax on the labor and services provided by a federal government contractor. Reply Br. Appellant at 25 (arguing that "the Department has levied a use tax on the labor and services of Alstom Canada as it is the use

tax on design engineering, modeling, and testing charges of Alstom Canada and Alstom France that are at issue in this case"). The Department's current position in this case is not that a state can tax a federal contractor's labor and services, but that the engineering and labor provided by Alstom Canada and France enhanced the value of the turbines' replacement parts. The Department, therefore, correctly accounted for the costs of such services to determine the value of the parts.

Put differently, the issue in this case is not over what a state may tax (the issue in *Washington*), but how to determine the value of an article used under RCW 82.12.010(7)(b). Thus, not only is the Department's position in this case consistent with its position in *Washington*, but the two positions are on entirely different issues.

By raising *Metalfab* and the brief excerpt in *Washington*, Alstom USA is attempting to confuse the facts and issues of this case. Alstom USA wants to portray the Department as having improperly taxed engineering and labor. The

Department did no such thing. The Department accounted for the costs of the engineering and labor to manufacture the turbines' replacement parts to determine the parts' value.

There is a clear difference between directly taxing engineering and labor versus accounting for the engineering and labor that went into creating an article to determine the article's value. Alstom USA ignores this difference. But it is implausible that the engineering and the labor to manufacture an article do not affect its value.

Here, the engineering and labor provided by Alstom Canada and France enhanced the value of the turbines' replacement parts. Such services certainly affect the value of the parts, and it was not only proper, but necessary for the Department to account for the costs of such services to determine the parts' value.

E. The Board Erred by Bifurcating the Contract between Alstom USA and the Army Corps

The Board held that "the engineering and testing work done prior to the authorization to go forward with rehabilitation

of the turbine generators is not included in that value." AR 32-33. But there is no difference between the engineering and labor provided by Alstom Canada and France before or after the Army Corps' approval, as both enhanced the value of the turbines' replacement parts.

1. The administrative record does not provide for when the Army Corps approved Alstom USA's rehabilitation plan or what costs Alstom USA incurred before approval

The Board bifurcated the contract between Alstom USA and the Army Corps without understanding the contract's approval terms. The administrative record does not contain documents to clarify when the Army Corps approved Alstom USA's rehabilitation plan for the turbine units on the Chief Joseph Dam (even on how many times the Army Corps sent an approval notice) or information on which invoices were sent before or after the approval or approvals.

Alstom USA argues that the Department falsely stated that the administrative record does not contain the date of when the Army Corps "provided Alstom/GE with notice to proceed

with the work or with costs of work performed by subcontractors Alstom Canada and Alstom France before each notice." Reply Br. Appellant at 7. Contradictorily, they also admitted that they only told the Department's counsel of what they believed was the date after the Board's Final Decision. *Id*.

After the parties filed separate petitions for judicial review of the Final Decision to the superior court, Alstom USA's counsel e-mailed the Department's counsel a letter dated September 1, 2009, and represented the letter as the Army Corps' "notice to proceed with respect to the Newport News generators." Reply Br. Appellant at 7; CP 90. Alstom USA's counsel later followed up the letter with an invoice from Alstom USA to the Army Corps dated August 1, 2009, and represented the invoice as showing the costs for the engineering and labor provided by Alstom Canada before the Army Corps' approval. CP 91. The letter and new invoice are not in the administrative record, and cannot be added to the record.

The APA, under RCW 34.05.562, only allows for a court to "receive evidence in addition to that contained in the agency record for judicial review" in limited circumstances. Alstom USA never argued that any of these circumstances applies here.[5] The letter and invoice are then just assertions made by one counsel to another. Ultimately, the record simply does not show when the Army Corps approved Alstom USA's rehabilitation plan or what cost Alstom USA incurred before or after approval.

Even if the Court considers the letter and accompanying invoice part of the record, there are other documents in the record that appear to contradict Alstom USA's claims on when

[5] In their Petitioners' Motion to (1) Consolidate the Parties Petitions for Review into One Action (2) and Certify the Consolidated Case to the Court of Appeals for Direct Review before the Superior Court, Alstom USA stated that they had intended to, but would not seek to introduce into evidence two documents under RCW 34.05.562. CP 64. Alstom USA did not state which section under RCW 34.05.562 they would cite to support introducing new evidence into the administrative record.

they incurred engineering and labor costs from Alstom Canada and France. Alstom USA states that the documents around AR 454 are "the invoice for 'model testing' and 'engineering' prior to USACE's approval to proceed with work on the Newport News generators." Reply Br. Appellant at 7. The documents from AR 447 to AR 455 are invoices from Alstom Canada to Alstom USA dating from December 6, 2011 to February 22, 2011. Given the respective dates of these invoices and the letter, dated September 1, 2009, the logical conclusion here is that either these invoices show costs incurred by Alstom USA long after the Army Corps had sent the letter, or that the letter does not relate to these invoices at all.

Alstom USA may attempt to explain away this incongruity by arguing that the invoice their counsel sent to the Department's counsel after the Board issued the Final Decision reflects the true date of when Alstom Canada had provided engineering and labor on the turbines. But there is no evidence in the administrative record (testimony, documentary, or

otherwise) to show how this invoice relates to the invoices that are in the record or to the work performed by Alstom Canada and France.

Furthermore, it appears that the Board believed that the Army Corps provided only one approval notice, but according to the contract between Alstom USA and the Army Corps, the Army Corps was to provide multiple notices. *See* AR 191 ("Five additional notices will be issued to the Contractor to proceed with the fabrication and delivery of replacement runners and appurtenances for the remaining nine Newport News units"). These additional notices are not in the record. The contractual provision does show, however, that the Board erred by using when the Army Corps sent an approval notice as the dividing line to bifurcate the contract or, at a minimum, the Board did not have enough evidence to do so.

The Court should, therefore, reverse the Board's bifurcation of the contract because there was no reason for the Board to believe that date or dates of when the Army Corps

approved Alstom USA's rehabilitation plan was significant to the value of the turbines' replacement parts. The Board did not know when the approval happened, or how many approvals there were altogether, or what cost Alstom USA had incurred before and after approval.

2. The engineering and labor done before and after the Army Corps' approval both enhanced the value of the turbines' replacement parts

The reason why the administrative record does not contain an approval notice or notices, or information on which invoices were sent before or after approval or approvals, is that neither Alstom USA nor the Department had argued that the approval date or dates had any significance. Alstom USA's position now, and throughout this case, is that the Department may only tax materials, not the engineering and labor that went into producing the turbines' replacement parts. AR 30-31 ("[t]here should be no distinction in how the design and engineering is treated before or after USACE's authorization because these costs and charges were not for materials or

tangible personal property"). It is then inconsequential when Alstom Canada and France provided Alstom USA with the engineering and labor necessary to produce the parts.

The Department agrees that there is no difference between the engineering and labor done before or after the Army Corps' approval; however, as the Board points out, Alstom USA misconstrued the issue in this case. *See* AR 29 ("[t]he Taxpayer has argued that by taxing the labor and engineering used in the parts the Department is taxing activities that took place outside the state. The statutes and rules authorize the imposition of use tax on the value of the article used; and that value includes the costs of labor and engineering for the parts"). The Department did not tax engineering and labor. The Department accounted for the engineering and labor provided by Alstom Canada and France to measure the value of the article used; here, the turbines' replacement parts.

Whether Alstom Canada and France provided the engineering and labor before or after the Army Corp approved

Alstom USA's rehabilitation plan does not matter. The question is whether the engineering and labor done before approval enhanced the value of the turbines' replacement parts, and the answer is that such engineering (including design, testing and modeling) not only enhanced but made the parts possible.

The rehabilitation of the turbine units on the Chief Joseph Dam was not akin to regular maintenance or repair to the machinery of a building, such as furnace or HVAC maintenance. It required research, planning, the design of new parts, and the implementation of new and updated technology; all of which required modeling and testing to ensure that the rehabilitation would increase the turbines' energy output. Overall, it took close to two decades to complete. AR 260. In fact, Alstom USA began researching on how to rehabilitate the turbines years before the Army Corps had even requested quotes to rehabilitate the Dam. AR 300.

Without designing a rehabilitation plan and determining what parts on the turbine units need replacing or whether there

is a need to create new parts, Alstom USA would ultimately not have the turbines' replacement parts it installed onto the Chief Joseph Dam. Without testing the plan and seeing whether the replacement parts or new parts would work, Alstom USA would likewise not have these turbines' replacement parts. Therefore, the Department correctly included the costs of the engineering and labor provided by Alstom Canada and France before and after the Army Corp's approval to determine the value of the turbines' replacement parts.

III. CONCLUSION

The Court should affirm the Board's conclusion that calculating the use tax on the replacement parts that Alstom USA purchased in its capacity as a federal contractor properly includes engineering and design services it purchased from its affiliates. The Court should reverse the Board's decision to bifurcate the contract contrary to the contract's provision and documents in the record.

This document contains 4,917 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 22nd day of August, 2022.

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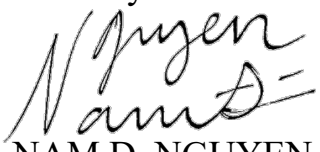

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of August, 2022, at Tumwater, WA.

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